United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

76-1457

To be argued by
JONATHAN J. SILBERMANN

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

PAUL WILLIAMS,

Defendant-Appellant.

Docket No. 76-1457

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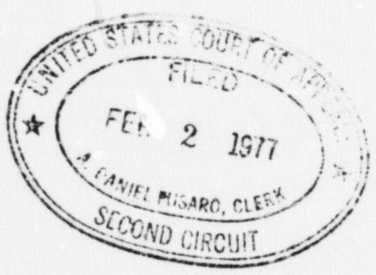
P/S

BRIEF FOR APPELLANT
PAUL WILLIAMS

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, -against- PAUL WILLIAMS, Defendant-Appellant.	Docket No. 76-1457

BRIEF FOR APPELLANT PAUL WILLIAMS

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

QUESTIONS PRESENTED

1. Whether the judge's instruction that a defendant intends the natural and probable consequences of his acts is reversible error.

2. Whether appellant's convictions under Counts One and Five merge with his convictions under Counts Two and Six, respectively.

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This is an appeal from a judgment of the United States District Court for the Eastern District of New York (The Honorable Henry Bramwell) rendered on October 1, 1976, after a trial before a jury, convicting appellant Williams of two counts of aiding and abetting the possession of narcotics with the intent to distribute (21 U.S.C. §841(a)(1), 18 U.S.C. §2)(Counts One and Five) and two counts of aiding and abetting the actual distribution of those drugs (21 U.S.C. §841(a)(1), 18 U.S.C. §2) (Counts Two and Six). Appellant was sentenced to ten years' imprisonment and seven years' special parole on each count, the sentences to run concurrently.

The Legal Aid Society, Federal Defender Services Unit was continued as counsel on appeal, pursuant to the Criminal Justice Act.

Statement of Facts

A. The Indictment*

On May 18, 1976, a superseding indictment was filed charging appellant Williams and co-defendant David White with four counts

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*The indictment is "B" to appellant Williams' separate appendix.

of violating the Federal narcotics laws. Counts One and Two charged that on July 10, 1974, appellant aided and abetted in the possession of approximately 91 grams of cocaine with the intent to distribute (Count One) and aided and abetted the distribution of that same drug (Count Two). Counts Five and Six* alleged that on April 19, 1974, appellant aided and abetted the possession with the intent to distribute approximately 28 grams of heroin (Count Five) and aided and abetted the distribution of the same drug on that day (Count Six).

B. The Trial

It was the Government's theory that on April 19 and July 10, 1974, appellant Williams participated in the sale of narcotic drugs to New York City police officer Octavio Pons, acting as an undercover agent. The police officer was the Government's principal witness.

Officer Pons testified that during the evening of April 18, 1974, he met co-defendant White and another individual, later identified as Lance Hargrove, on a street corner in Queens, New York (July 14, 1976, 44-45; July 15, 1976, 19.)** From there, the three went to the apartment of a friend of White's (July 14,

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*Counts Three and Four involved separate charges against co-defendant White. Specifically, the indictment charged that on May 21, 1974, White possessed with the intent to distribute and distributed approximately 15 grams of heroin. Appellant Williams was tried separately from co-defendant White.

**Numerals in parentheses preceded by a date refer to the pages of the trial transcript occurring on that date.

1976, 51; July 15, 1976, 19). They discussed the purchase of narcotics and after a few minutes in the apartment, drove to meet the connection (July 14, 1976, 52-53). Since Hargrove and White then had difficulty making arrangements with their supplier, Officer Pons and White left the area but after a short period of time, rejoined Hargrove in front of the Franklin Arms Hotel to complete the deal (July 14, 1976, 53, 56-58; July 15, 1976, 21-25). Hargrove and White went into the hotel. Shortly thereafter they returned, accompanied by another man, identified at trial by Pons as appellant (July 14, 1976, 60; July 15, 1976, 27-28). According to Officer Pons, he, appellant Williams, White and Hargrove then walked to the officer's automobile. All of them got into the car except for appellant who remained outside. White sat on the passenger's side of the front seat; Hargrove, in the rear; and Officer Pons, in the driver's seat (July 14, 1976, 61-62; July 15, 1976, 31). Officer Pons testified that after co-defendant White lowered his window, appellant Williams gave White a small package which White, in turn, gave to the police officer. Officer Pons paid White $1,500 for the package, which contained a powder, subsequently identified as heroin (July 14, 1976, 30, 62-65; July 15, 1976, 31-32).

Officer Pons also testified that he purchased drugs on July 10, 1974. At approximately 11:20 p.m., the officer met co-defendant White at the Scorpio Bar. There, White told Pons that the connection, who, according to Pons, was identified as "Fat Paul," was waiting at another bar, the Day After Lounge

(July 15, 1976, 6, 35). Officer Pons testified that he then went to the Day After Lounge, where he saw appellant Williams seated at the bar (July 15, 1976, 7, 37). According to Pons, appellant and White walked over to the officer and discussed the sale. Officer Pons stated that after this conversation, appellant left the bar, returning in five minutes (July 15, 1976, 8-10). The police officer testified that a short time thereafter, he, appellant Williams, and co-defendant White went into the men's lavatory at the bar, where appellant Williams gave the police officer a plastic bag containing white powder* (July 15, 1976, 10-11, 40). Further, Pons testified that after telling appellant and White that the money for the purchase was in the officer's car, these three individuals walked to the automobile and got in. According to Pons, once in the car, he gave $4,500 to appellant (July 15, 1976, 11-14).**

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*Joseph Barbato, a chemist for the Drug Enforcement Administration, testified that this bag contained 91.7 grams of cocaine and lactose (July 14, 1976, 33).

**Detective Bernhart of the New York City Police, also testified on the Government's behalf. Bernhart was not present during the two narcotics sales. While confirming some of the events about which Officer Pons had testified (July 15, 1976, 50-57, 61-67), Detective Bernhart was unable to identify appellant Williams as a participant in the drug transaction of April 19, 1974 (July 15, 1976, 55-56).

C. The Charge*

After reading the four relevant counts of the indictment, the District Court explained to the jurors that each count charged a separate crime (Charge, 10).** Re-reading 18 U.S.C. §2 twice to the jurors, Judge Bramwell repeated four times his instructions that the various offenses were based on the theory that appellant Williams had aided and abetted the applicable substantive crime (Charge , 11-14, 16, 18-22, 23-24). The District Judge instructed on willfulness and intent seven times, telling the jurors, with minor variations:

> "Participation is willful if done voluntarily and intentionally, and with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say with bad purpose either to disobey or to disregard the law." (Charge , 12, 13, 14, 19, 20, 21, 34)

To define the specific intent necessary for a conviction on aiding and abetting,*** the court charged:

> "Specific intent...means more than the general intent to commit the act. To establish specific intent, the Government must prove that a defendant know-

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*The charge is "C" to appellant's separate appendix.

**Numerals in parentheses preceded by "Charge" refer to pages of the transcript of the Judge's instructions to the jurors. Since these instructions were not numbered continuously by the court reporter, the pages have been consecutively renumbered for this appeal and, as such, included in the appendix. References to the Judge's instructions are to the pages of the charge as renumbered.

***In addition, Judge Bramwell instructed the jurors that in order to convict on the possession counts, they were requied to find that appellant had the specific intent to distribute narcotics (Charge , 15-16).

> ingly did an act with which the law forbids, purposely intending to violate the law." (Charge, 34)

Judge Bramwell stated that this specific intent was applicable to every offense charged (Charge, 34). As to how it might be proved, the District Judge instructed:

> "Such intent may be determined from all the facts and circumstances surrounding the case." (Charge, 34)

Then the Court stated:

> "Intent ordinarily may [not] be proved directly, because there is no way of fathoming or scrutinizing the operations of the human mind. But you may infer the defendant's intent from the surrounding circumstances. You may consider any statement made and act done or omitted by a defendant, and all other facts and circumstances in evidence which indicate his state of mind. It is ordinarily reasonable to infer that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted." (Charge, 34-35).

During the course of additional instructions about knowledge and intent, Judge Bramwell reiterated his prior instructions, telling the jury:

> "Knowledge and intent exists in the mind. Since it is not possible to look into a man's mind to see what went on, the only way you have for arriving at a decision in these questions is for you to take into consideration all the facts and circumstances shown by the evidence, including the exhibits, and to determine from all such facts and circumstances whether the requisite knowledge and intent were present at

> the time in question. Direct proof is unnecessary. Knowledge and intent may be inferred from all the surrounding circumstances.
>
> As far as intent is concerned, you are instructed that a person is presumed to intend the natural and probable, or ordinary, consequences of his act." (Charge , 38-39)

After deliberations, the jurors found appellant guilty as charged.

On October 1, 1976, appellant was sentenced to ten years' imprisonment and a special parole term of seven years on Count One and to the same sentence on Counts Two, Five and Six, all terms to be served concurrently.

ARGUMENT

POINT I.

THE JUDGE'S INSTRUCTION THAT A DEFENDANT INTENDS THE NATURAL AND PROBABLE CONSEQUENCES OF HIS ACTS IS REVERSIBLE ERROR.

Appellant was charged with aiding and abetting the possession of narcotic drugs with intent to distribute and the distribution of those drugs. In order to find appellant guilty of distribution (Counts Two and Six), the jurors were required to find that appellant had the specific intent necessary for aiding and abetting -- an intent to make the venture (here, an illicit drug distribution) succeed and to facilitate its commission. United States v. Bryant, 461 F.2d 912, 920 (6th Cir. 1972); United States v. Prince, 529 F.2d 1108, 1112 (6th Cir. 1976); United States v. Peoni, 100 F.2d 401, 402 (2d Cir. 1938); see also, United States v. Mariani, 539 F.2d 915, 919 (2d Cir. 1976); United States v. Dickerson, 508 F.2d 1216, 1217-1218 (2d Cir. 1975); Cf. United States v. Gallishaw, 428 F.2d 760, 763 (2d Cir. 1970).

The counts charging appellant with possession (Counts One and Five) not only required proof of this specific intent but also the specific intent to commit the underlying crime -- the intent to distribute the drugs possessed. 21 U.S.C. §841(a)(1). United States v. Clark, 475 F.2d 240, 248 (2d Cir. 1973). Despite the fact, as the jurors were unequivocally instructed, that such specific intent was an element of the crimes charged, the court

erroneously instructed the jurors on two occasions as to how that intent might be proved, saying that it was "ordinarily reasonable to infer that a person intends the natural and probable consequences of acts knowingly done..."* Where specific intent is required, this instruction is irreconcilably in conflict with proof of that element, and is plain error requiring reversal. United States v. Robinson, Doc. No. 76-1214, slip op. 445, 451-454 (2d Cir., November 10, 1976); see United States v. Bertolotti, 529 F.2d 149, 159 (2d Cir. 1975); United States v. Barash, 365 F.2d 395, 402-403 (2d Cir. 1966).

The danger of the charge here is that it enabled the jurors to find that the Government's burden of proof of specific intent, requiring a knowing participation in the sale of narcotics and an intent to make the plan succeed, was satisfied by proof of the sale alone. Moreover, the charge erroneously allowed the jurors to convict for possession with the intent to distribute based on mere possession (Counts One and Five). See United States v. Barash, supra, 365 F.2d at 402. Further, since the erroneous instruction appears in the same portions of the charge that advise that intent may be inferred from all the facts and circumstances, the jurors had before them, at best, two conflic-

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*On the second occasion, Judge Bramwell told the jurors that a person is presumed to intend the natural and probable consequences of his acts. The District Judge's erroneous "natural and probable consequences" charge is apparantly part of his "boiler plate" instructions to the jurors. See United States v. Caceres, Doc. No. 76-1464. The same issue is presented in that case, which is now pending before this Court.

ting instructions on how specific intent may be proved. At worst, they were instructed that in this case, the broader rule is limited by the applicability of the narrower one.* Since the charge itself, when viewed as a whole, does not cure the error (United States v. Park, 421 U.S. 658 (1975); see also Cupp v. Naughten, 414 U.S. 141 (1973)), the erroneous charge is as substantial a mistake as it would be if it were the only instruction given on the manner of proving the element of specific intent. United States v. Robinson, supra, slip op. at 454.

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*This structuring of the charge makes United States v. Erb, Doc. No. 76-1143, slip op. 49, 65 (2d Cir., October 1, 1976), inapplicable. In Erb, the judge instructed the jury on the issue of intent so as to make that element clear.

POINT II.

APPELLANT'S CONVICTIONS UNDER COUNTS ONE AND FIVE MERGE WITH HIS CONVICTIONS UNDER COUNTS TWO AND SIX, RESPECTIVELY

Counts One and Two of the superseding indictment were based on a single transaction involving the alleged sale of 91 grams of cocaine on July 10, 1974, to an undercover agent. Count One charged that appellant possessed the cocaine with the intent to distribute it (21 U.S.C. §841(a)(1)), while Count Two charged appellant's actual distribution of that same cocaine on the same day, in violation of the same statutory provision. Similarly, Counts Five and Six involved one transaction, alleging the sale of 28 grams of heroin to the agent involved in the July 10 sale. Thus, Count Five charged that on April 19, 1974, appellant possessed the heroin with the intent to distribute, and Count Six alleged the distribution of that drug on the same day, all in violation of 21 U.S.C. §841(a)(1).

It is established law that where the gravamen of two offenses is identical, the convictions of the defendant for those offenses merge. See, e.g., Prince v. United States, 352 U.S. 322, 329 (1957). As to the crimes charged in the indictment in the instant proceeding,

> [t]he gravamen of each offense is the distribution of a controlled substance; when the intent is carried out by a successful sale, the offenses [of possession and distribution] merge.

United States v. Curry, 512

F.2d 1299, 1306 (4th Cir. 1974).*

See also United States v. Stevens, 521 F.2d 334, 336-337 (6th Cir. 1975); United States v. Atkinson, 512 F.2d 1235, 1240 (4th Cir. 1975); Cf. United States v. Howard, 507 F.2d 559, 563 (8th Cir. 1974) (merger of "possession" and "possession with intent to distribute" counts based on a single transaction).** Thus, appellant's convictions on Counts One and Five therefore merged with his convictions on Counts Two and Six, respectively. Consequently, the judgment of conviction and sentence on Counts Two and Six must be vacated, the conviction and concurrent sentences on Counts One and Five set aside, and the case remanded for resentencing.***

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*In United States v. Curry, supra, as in the present proceeding, the appellant had been convicted of "possession with intent to distribute" and "distribution" of a controlled substance, based on a single transaction. Moreover, here, as in Curry, the proof involving the sales was relied upon by the Government to show appellant's intent to distribute. See also United States v. Atkinson, 512 F.2d 1235, 1240 (4th Cir. 1975).

**The Fifth Circuit, stating that it follows the "different evidence" test, has ruled that these crimes do not merge because it is theoretically possible to possess without distributing or to distribute without possessing a controlled substance. United States v. Horsley, 519 F.2d 264 (5th Cir. 1975). The "different evidence" test, however, is appropriate to double jeopardy rather than to merger questions. See, e.g., Morgan v. Devine, 237 U.S. 632 (1915). Indeed, the Fifth Circuit's application of the "different evidence" test conflicts with Prince v. United States, supra, 352 U.S. 322, since it is theoretically possible to enter a bank without robbing it or to rob a bank without entering it.

***While not precedent, this Court's memorandum decision in United States v. Caicedo, Doc. No. 76-1356 (November 23 1976), required the merger of the offense of possession of drugs with the crime of their distribution, the situation involved here. Thus, this decision supports appellant's position.

Although the sentence imposed on Counts One and Five was concurrent with the sentence imposed on Counts Two and Six, the sentence on the merged counts must be set aside because of their potential impact on the defendant's parole eligibility. United States v. Stevens, supra; Clermont v. United States, 432 F.2d 1215, 1217 (9th Cir. 1970); see also United States v. Gaddis, 424 U.S. 544, 549 n.12 (1976); United States v. Mariani, 539 F.2d 915, 917 (2d Cir. 1976). Moreover, the conviction on the merged counts must be vacated because of the detrimental collateral consequences of any improper felony conviction. Marshall v. United States, 436 F.2d 155, 161 (D.C. Cir. 1970); see also United States v. Maze, 414 U.S. 395, 397 n.1 (1974); Benton v. Maryland, 395 U.S. 784 (1969); cf. United States v. Morgan, 346 U.S. 503, 505 (1954); Carafas v. LaVallee, 391 U.S. 234, 237-238 (1968); Fiswick v. United States, 329 U.S. 211, 222 (1946); United States v. Travers, 514 F.2d 1171, 1172 (2d Cir. 1974).

Finally, the concurrent sentence on the remaining counts should be vacated and the case remanded for resentencing because of the possibility, in cases of merger, that conviction on the merged count improperly affected the sentence imposed on the remaining count. See, e.g., United States v. Spears, 449 F.2d 946, 949 (D.C. Cir. 1971); United States v. Parker, 442 F.2d 779, 780 (D.C. Cir. 1971); Marshall v. United States, supra; Coleman v. United States, 420 F.2d 616 (D.C. Cir. 1969);

United States v. Parson, 452 F.2d 1007 (9th Cir. 1971).*

CONCLUSION

For the above-stated reasons, the judgment of the district court should be reversed and the case remanded for a new trial; in the alternative, the case should be remanded for resentence.

Respectfully submitted,

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*As this Court held in United States ex rel. Weems v. Follette, 414 F.2d 417, 419 (2d Cir. 1969), the Supreme Court's decision in Benton v. Maryland, supra, took much of the strength out of the concurrent sentence doctrine. In the aftermath of Benton, this Court has demonstrated a marked reluctance to apply the concurrent sentence doctrine. United States v. Mapp, 476 F.2d 67, 82 (2d Cir. 1973); United States v. Brown, 479 F.2d 1170, 1173, 1176 (2d Cir. 1973); United States v. Rivera, 521 F.2d 125, 129 (2d Cir. 1975); Seiller v. United States, 544 F.2d 554, 556 n.12 (2d Cir. 1975).

CERTIFICATE OF SERVICE

Feb 2, 1977

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Eastern District of New York.

Nathan Silberman